

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TIMOTHY R. JOHNSON : CIVIL ACTION  
:   
vs. :   
:   
PENNSYLVANIA DEPARTMENT :   
OF CORRECTIONS, ET AL. : NO. 99-5325

**MEMORANDUM AND ORDER RE: MOTION FOR RECONSIDERATION**

YOHN, J. MARCH , 2002

Timothy R. Johnson, a prisoner then at the State Correctional Institution at Graterford sued various prison officials and healthcare providers under § 1983 for deliberate indifference to his serious medical needs in violation of the Eighth Amendment and for various state law violations. Plaintiff alleges that he has hepatitis C and that the defendants failed to treat him when he was diagnosed with the condition by a prison doctor on December 11, 1998. Plaintiff alleges that treatment was available at that time through drugs approved by the U.S. Food and Drug Administration known as Interferon and Ribaviran but the drugs were not provided to him.

On November 17, 1999, I ordered the clerk to appoint counsel for the plaintiff from the Prisoner Civil Rights Panel. On January 13, 2000, John McCullough, Esquire was appointed as plaintiff's attorney.

In due course the defendants filed a motion for summary judgment on which I held oral argument on August 17, 2000. At the oral argument defendants advised the court that the plaintiff did in fact have inactive hepatitis C and that the drug combination had been approved by the FDA by December of 1998. However, they stated that there was a dispute in the medical community as to its usage and whether it was appropriate for this particular plaintiff. In addition, the Department of Corrections defendants advised that the department had to develop a protocol for

the treatment of hepatitis C through Interferon but that the protocol was not completed until June of 1999 and plaintiff was one of the first prisoners in the Commonwealth of Pennsylvania to receive the treatment thereafter.

Plaintiff's counsel acknowledged the absolute need for a medical expert to support plaintiff's claims and, as a result, on August 17, 2000 I placed this action in civil suspense in order to give plaintiff's counsel time to obtain a medical expert to support plaintiff's claims.

By May 1, 2001, the plaintiff had not yet been able to obtain a medical expert and after a telephone conference with all counsel and by agreement of all counsel I ordered that plaintiff must obtain his medical expert within ninety days of that date or I would dismiss the action by agreement of counsel. On August 10, 2001, plaintiff's counsel advised the court that no medical expert could be obtained and therefore, in accordance with the agreement of counsel and the order of May 1, 2001, I dismissed the action with prejudice by agreement.

Plaintiff then filed a pro se motion for reconsideration of the order dismissing the complaint on August 27, 2001 and I scheduled oral argument for November 1, 2001. Both plaintiff and his counsel attended the hearing. At that hearing plaintiff's counsel outlined his efforts to obtain a medical expert by contacting a number of doctors who declined to participate in the case on a pro bono basis, contacting the Civil Rights Panel to determine whether funding would be available for a medical expert and contacting other large law firms to determine whether they would fund a medical expert, but he was unable to obtain one. Plaintiff himself stated that he would like to try to obtain a medical expert himself and, therefore, I issued an order deferring disposition of plaintiff's motion for reconsideration until February 1, 2002. I stated that in the event the plaintiff obtained a medical expert by that date I would consider the expert's report in disposing of the motion for

reconsideration. In the event that he was unable to obtain a medical expert the motion for reconsideration would be denied.

Plaintiff has not as yet obtained a medical expert and, therefore, the motion for reconsideration is denied in accordance with the prior orders. It is clear to the court, as it was clear to plaintiff's counsel, that he must have a medical expert in order to have any chance of success with his claim and he has been unable to obtain such an expert after more than nineteen months of efforts by himself and his counsel. Moreover, it is clear that on the merits plaintiff needs a medical expert who could evaluate whether the drug combination which he proposed would be appropriate treatment for him, as opposed to others who may have hepatitis C and, even if it was appropriate, what harm he may have suffered by not having the drug combination administered to him from December of 1998 through mid-1999. Plaintiff has numerous other problems of proof; however, without these two essential elements he has no hope of success.

Moreover, plaintiff's motion for reconsideration contains no allegations which would meet any of the standards for granting a motion for reconsideration. For the most part, he complained about his attorney rather than dealing with the merits of his action. Motions for reconsideration are granted when there has been (1) the development of an intervening change in the law, (2) emergence of new evidence not previously available, or (3) the need to correct the clear error of law or prevent a manifest injustice. Plaintiff has not met any of these standards.

The only evidence which the plaintiff has submitted is the transcript of the testimony of one of the defendants in this action in a criminal proceeding in the Carbon County Court of Common Pleas involving a person who is not a party to this action. The testimony does not relate in any way to whether the plaintiff in this action needs the drug treatment which he alleges, whether

it would have been appropriate treatment for him in December of 1998 or whether his failure to receive that treatment from December of 1998 through mid-1999 had any harmful effect upon him. In addition, the testimony in no way constitutes an expert witness report that the plaintiff could use in this action and that would comply with the court's order of August 22, 2000 and in no way complies with the requirements of Federal Rule of Civil Procedure 26 as to expert witness reports.

As a result, the motion for reconsideration will be denied.

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O R D E R

AND NOW, this \_\_\_\_\_ day of March, 2002, upon consideration of the plaintiff's motion for reconsideration of order to dismiss civil complaint (Document No. 81), the responses of the defendants, and the reply of the plaintiff to those responses, **IT IS HEREBY ORDERED** that the motion for reconsideration is **DENIED**.

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William H. Yohn, Jr., Judge